

## **Attachment A to Complaint**

June 6, 2019

**Submitted Via FOIAOnline.gov**

Freedom of Information Officer  
National Oceanic and Atmospheric Administration, Fisheries  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

Re: Freedom of Information Act Request

Dear FOIA Officer:

On behalf of the Natural Resources Defense Council, this is a request to the National Oceanic and Atmospheric Administration, Fisheries ("NOAA Fisheries"), for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

Scope of Request

1. All records<sup>1</sup> related to the reinitiated Endangered Species Act Section 7 consultation on the Coordinated Long-term Operation of the Central Valley Project and State Water Project and endangered winter-run Chinook salmon
2. All records related to the reinitiated Endangered Species Act Section 7 consultation on the Coordinated Long-term Operation of the Central Valley Project and State Water Project and threatened spring-run Chinook salmon

<sup>1</sup> "Records" means anything denoted by the use of that word or its singular form in the text of FOIA and includes correspondence, minutes of meetings, memoranda, notes, emails, notices, facsimiles, charts, tables, presentations, orders, filings, and other writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored). This request seeks responsive records in the custody of any NOAA Fisheries office, including, but not limited to, NOAA Headquarters offices, and specifically including NOAA Fisheries offices in possession of responsive records.

Request for Fee Waiver

**I. Request for a Fee Waiver**

NRDC requests that NOAA Fisheries waive any fee it would otherwise charge for search and production of the records described above. FOIA dictates that requested records be provided without charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The requested disclosure would meet this requirement. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

**A. NRDC Satisfies the First Fee Waiver Requirement**

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). The public does not currently possess comprehensive information regarding NOAA Fisheries and the Bureau of Reclamation’s consultation on the effects of continued long-term operations of the Central Valley Project (CVP) and State Water Project (SWP) on endangered winter-run Chinook salmon and threatened spring-run Chinook salmon. There is more than a reasonable likelihood that these records have informative value to the public because of the recent significant declines in salmon populations in the Sacramento River and ongoing public agency actions to update salmon protection requirements. *See Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 109 (D.D.C. 2006).

We believe that the records requested are not currently in the public domain. Their disclosure would thus meaningfully inform public understanding with respect to the effect of CVP and SWP operations on salmonid protection and habitat. However, if NOAA Fisheries were to conclude that some of the requested records are publicly available, NRDC would like to discuss that conclusion and might agree to exclude such records from this request.

Because NRDC is a “representative of the news media,” as explained below, NOAA Fisheries must presume that this disclosure is likely to contribute to public understanding of its subject. However, even if NRDC were not a media requester, NRDC’s expertise in the impacts of water diversions and water project operations on salmonid protection and management in California, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed

records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is a strong likelihood that disclosure of the requested records will increase public understanding of the subject matter. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (finding that a requester that specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than 3.1 million members and online activists are "a broad audience of persons interested in the subject" of salmonid protection and water management, and when combined with NRDC's communications to the public at large, the likely audience of interested persons to be reached is certainly "reasonably broad." As NRDC's long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. These include, but are not limited to the following:

- NRDC's website, available at [www.nrdc.org](http://www.nrdc.org), is updated daily and draws approximately 1.7 million page views and 736,000 unique visitors per month.
- NRDC's Activist email list includes more than 2.5 million members and online activists who receive regular communications on urgent environmental issues. This information is also made available through NRDC's online Action Center at <https://www.nrdc.org/actions>.
- *NRDC Insider* is a weekly electronic environmental newsletter distributed by email to more than 1.8 million subscribers.
- NRDC updates and maintains several social media accounts with hundreds of thousands of followers: Facebook, Twitter, Instagram, YouTube, and LinkedIn. We also use Medium as another distribution channel for our content.

NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Sonic Sea*, [Stories from the Gulf](#), and *Acid Test*, narrated by Rachel McAdams, Robert Redford, and Sigourney Weaver, respectively; participates in press conferences and interviews with reporters and editorial writers; distributes content on Huffington Post; and has more than fifty staff members dedicated to communications work.

NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates);
- Film, “Water & Power: A California Heist,” National Geographic, 2017 documentary (appearance by NRDC Senior Attorney Doug Obegi);
- Article, “A big red reason not to dig a mine in Alaska’s fat bear country,” *Mashable*, May 24, 2019 (quoting NRDC Western Division Director Joel Reynolds);
- Transcript, “Trump Administration Shortcuts Science To Give California Farmers More Water,” Nat’l Pub. Radio, *All Things Considered*, March 11, 2019 (quoting NRDC Senior Attorney Doug Obegi);
- Article, “Trump’s minions are using California wildfires as excuse to attack endangered species protections,” *Los Angeles Times*, Aug. 8, 2018 (quoting NRDC Water Division Director Kate Poole).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including fish and wildlife protection and water management. NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public’s understanding of the subject.

Finally, the records requested shed light on a matter of considerable public interest and concern: salmon survival and water management in the San Francisco Bay-Delta estuary.

## **B. NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. “Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see*

*Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about salmon impacts associated with administration of the Sacramento River Settlement Contracts. As noted at Part II.A, any work done by NOAA Fisheries on these issues relates to a matter of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of these issues and associated threats to the environment.

### **C. NRDC Is a Media Requester**

Even if NOAA Fisheries denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a “non-profit public interest organization” qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public).

NRDC is in part organized and operated to gather and publish or transmit news to the public. As described earlier in this request, NRDC publishes original reporting of environmental news stories on its website, <http://www.nrdc.org>. Previously, NRDC published stories like these in its magazine, *OnEarth*, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. NRDC maintains a significant additional communications presence on the internet through its staff blogs on <http://www.nrdc.org>, which are updated regularly and feature writing about current environmental issues, through daily news messaging on “Twitter” and “Facebook,” and through content distributed to outlets such as Medium. *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that “as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities”). The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs more than fifty staff members dedicated full-time to communications with the

public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).<sup>2</sup>

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured on its website, in its newsletters and blogs, and on other media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

## **II. Willingness to Pay Fees Under Protest**

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with NOAA Fisheries FOIA regulations. Please contact me before doing anything that would cause the fee to exceed \$500. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

## **IV. Conclusion**

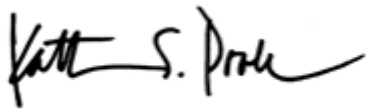
Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; NOAA Fisheries’ search for—or deliberations concerning—certain records should not delay the production of others that NOAA Fisheries has already retrieved and elected to produce. If NOAA Fisheries concludes that any of the records requested here are publicly available, please let

<sup>2</sup> To be a representative of the news media, an organization need not *exclusively* perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

me know.

Thank you in advance for your prompt attention to this request. We look forward to receiving your response within the period required by law. Please do not hesitate to telephone me should you have any questions regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Kath S. Poole", with a stylized, flowing script.

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cc: Maria Rea, Assistant Regional Administrator, California Central Valley Office, NOAA Fisheries